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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RYAN Q. CLARIDGE,

Plaintiff,

vs.

I-FLOW CORPORATION, a Delaware corporation; I-FLOW, LLC, a Delaware limited liability company; DJO LLC (f.k.a. DJ ORTHOPEDICS, LLC), a Delaware limited liability company; DJO, INCORPORATED, aka DJO, INC., a Delaware corporation; STRYKER CORPORATION, a Michigan corporation; and STRYKER SALES CORPORATION, a Michigan corporation,

Defendants.

CASE NO.: 2:18-cv-01654-GMN-PAL

MOTION TO DISMISS AND STRIKE PORTIONS OF THE COMPLAINT BY DEFENDANTS STRYKER CORPORATION AND STRYKER SALES CORPORATION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Complaint Filed: _August 30, 2018

Defendants Stryker Corporation and Stryker Sales Corporation (collectively "Stryker") by and through their counsel, Snell & Wilmer L.L.P., hereby move this Court for an Order, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing portions of Plaintiff Ryan Claridge's ("Plaintiff") Complaint, without leave to amend, on the following grounds:

1. The Fourth and Fifth Causes of Action – Plaintiff's claims for breach of implied warranty fail, as a matter of law, due to the lack of privity between Stryker and Plaintiff.

2. The Sixth Cause of Action – the claims for misrepresentation and fraudulent concealment fail to satisfy the heightened pleading requirements under Rule 9(b), in the absence of specific allegations of fraudulent, egregious, or outrageous conduct by Stryker.

Stryker will further move this Court for an Order, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, striking the claims for Punitive Damages, as set forth on Pages 11 and 12 of the Complaint. This Motion is made on the grounds that Plaintiff has failed to plead the requisite statutory facts, with the necessary specificity, in order to maintain this claim. As there are no viable grounds in law or fact for the recovery of Punitive Damages, this claim is properly stricken from the Complaint without leave to amend.

This Motion is based on this Notice, the Memorandum of Points and Authorities, all pleadings, documents, and records on file with this Court, and on such oral argument as may be presented at the hearing on this matter.

DATED this 7th day of December, 2018.

SNELL & WILMER L.L.P.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The litigation involving the medical device that is the subject of this lawsuit has been over for several years and, naturally, this raises many issues with the validity of Plaintiff's claims. As an initial matter, Plaintiff's Complaint lacks necessary and essential facts to maintain several of his claims and causes of action. More specifically, the claims for breach of implied warranty cannot be asserted against Stryker due to the lack of privity between Plaintiff and Stryker.[1] Plaintiff is not party to any agreement with Stryker and the Complaint is devoid of any facts suggesting otherwise. Further, the claims and causes of action for misrepresentation, fraudulent concealment, and punitive damages cannot be maintained as Plaintiff failed to meet the pleading requirements – the specific and necessary factual detail to assert these claims is entirely absent from the Complaint. As Plaintiff has not and cannot state facts to maintain these claims, they are properly dismissed without leave to amend.

II. PERTINENT FACTS AND PROCEDURAL HISTORY

In this product liability action, Plaintiff asserts claims for Strict Liability, Negligence, Breach of Express Warranty, Breach of Implied Warranty of Merchantability, Breach of Implied Warranty of Fitness for a Particular Purpose, Misrepresentation and Fraudulent Concealment, and Punitive Damages. These claims purportedly arise from shoulder surgeries performed in August 2005 and January 2006 by Dr. Randy Yee. Plaintiff's claims are premised on the allegation that, during the January 2006 surgery, his physician prescribed and placed a pain pump, as allegedly manufactured by Stryker, to provide a continuous flow of medication to the operative site, which then resulted in damage to his shoulder cartilage. Plaintiff also alleges that a similar pain pump device – this one made and sold by a different manufacturer, I-Flow Corporation – was prescribed to him following his August 2005 shoulder surgery. All of Plaintiff's injuries and damages allegedly arise from these two shoulder surgeries.

[1] Plaintiff agreed to dismiss his claim for Breach of Express Warranty.

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A pain pump is a small prescription device, typically composed of a receptacle to hold medication, a line to a catheter into the surgery site to receive medication, and a programmable pump set by the physician to deliver a specified quantity of medication at a specified interval. In his Complaint, Plaintiff loosely alleges that the pain pump possessed an unidentified defect in its design or manufacture and that there existed some nonspecific failure in the duties to provide for testing of the product, its warnings, and its instructions, all or some of which amounted to an alleged lack of reasonable care by Stryker. Despite the utter lack of specificity to any of these allegations, and the absence of any claims of malice, misrepresentation, or fraud on the part of Stryker, Plaintiff has also included a demand for punitive damages among the various other elements of relief sought. None of these egregious claims for relief can be maintained against Stryker, as Plaintiff cannot assert sufficient facts to meet the necessary pleading standards, and none can be invented to save the causes of action discussed herein.

Furthermore, litigation involving this prescription medical device commenced over a decade ago, where separate lawsuits were filed across the country against a number of manufacturers – including Stryker – who made and sold this type of device. However, the "pain pump litigation" ended a number of years ago. Over time, after Stryker and other defendants obtained favorable results at trials and on motions for summary judgement, many of the remaining cases were dismissed, settled, or otherwise resolved. Now, years after the litigation ended, Plaintiff brings this action, which will be revealed to have more than just the flaws discussed herein.

III. ARGUMENT

A motion to dismiss is appropriate, where there is an absence of sufficient facts alleged to support a cognizable legal theory. *Navarro v. Block,* 250 F.3d 729, 732 (9th Cir. 2001). To withstand such a challenge, Plaintiff must allege "enough facts to state a claim to relief that is plausible on its face" and allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007). Legal conclusions and threadbare recitals of elements, supported by mere conclusion, do not suffice. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). The courts "are not bound to accept as true

a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555. Rather, Rule 8 "contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented." *Id*., at 556. Thus, pleadings which fail to set forth factual allegations to support asserted legal conclusions should be dismissed. *Twombly*, 550 U.S. at 555; *see also*, *Iqbal*, 129 S. Ct. at 1950 (Rule 8 "does not unlock the doors of discovery for a Plaintiff armed with nothing more than conclusions").

Only substantive allegations of fact are presumed to be true when resolving a Rule 12(b)(6) motion. *Campanelli v. Bockrath*, 100 F.3d 1476, 1479 (9th Cir. 1996). Allegations that are (1) contradicted by judicial notice or exhibit, (2) conclusory, (3) require unreasonable inferences, and (4) require unwarranted deductions of facts are not entitled to a presumption of truth or to credibility for purposes of a motion to dismiss. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Ove v. Gwinn*, 264 F.3d 817, 821 (9th Cir. 2001). Courts do not assume the truth of legal conclusions when they are phrased as factual allegations in the Complaint and courts should not assume as true facts that a Plaintiff has not alleged. *Whitehorn v. F.C.C.,* 255 F. Supp. 2d 1092, 1095 (D. Nev. 2002); *see also Associated Gen. Contractors v. Cal. State Council*, 459 U.S. 519, 526 (1983).

Additionally, Federal Rule of Civil Procedure 12(f) provides that a court "may order stricken from any pleading . . . any redundant, immaterial, impertinent, or scandalous matter." "[T]he function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial . . . ." *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993). "Immaterial" matter is that which has no essential or important relationship to the claim for relief or the defenses being pleaded" and "'[i]mpertinent' matter consists of statements that do not pertain, and are not necessary, to the issues in question.'" *Id.* Here, as more fully discussed below, Plaintiff's claims for breach of implied warranty, misrepresentation and fraudulent concealment, and punitive damages are properly dismissed without leave to amend.

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A. PLAINTIFF'S CLAIMS FOR BREACH OF IMPLIED WARRANTY CANNOT BE MAINTAINED DUE TO THE LACK OF PRIVITY WITH STRYKER [FOURTH AND FIFTH CAUSES OF ACTION]

A claim of implied warranty requires contractual privity between the buyer and seller. *Finnerty v. Howmedica Osteonics Corp.,* No. 214CV00114GMNGWF, 2016 WL 4744130, at *7 (D. Nev. Sept. 12, 2016) (dismissing breach of implied warranty claims against a manufacturer of a surgical knee replacement product for lack of privity); see also *Gillson v. City of Sparks*, No. 03:06-CV-00325-LRH-RAM, 2007 WL 839252, at *5 (D. Nev. Mar. 19, 2007) ("[A] claim for breach of implied warranty cannot be maintained in the absence of privity."); *Long v. Flanigan Warehouse Co.*, 382 P.2d 399, 402 (Nev. 1963).

Claims based in breach of warranty are improper against a Stryker, due to the lack of privity between patient and manufacturer. Under the circumstances, the device at issue was sold by Stryker to the hospital and the surgeon – and not to Plaintiff – just as the warnings and instructions are directed to the physician, not the patient/Plaintiff. *Finnerty v. Howmedica Osteonics Corp.,* No. 214CV00114GMNGWF, 2016 WL 4744130, at *7 (D. Nev. Sept. 12, 2016); *see also Blanco v. Baxter Healthcare Corp.* 158 Cal.App.4th 1039, 1058-59 (2008) (patients rely on the physician's skill and judgment to select the [medical device], as evidenced by the fact [the device was] prescribed by a licensed physician").

Here, Plaintiff is not party to any agreement with Stryker and the Complaint is devoid of any facts suggesting such a condition or any other grounds to assert the existence of privity. Plaintiff simply claims to have been prescribed a pain pump by his treating physician; there was no relationship between Stryker and Plaintiff and no circumstances under which such a relationship could be formed. Under these circumstances, given lack of any type of relationship between Stryker and Plaintiff, the claims for Breach of Implied Warranty of Merchantability and Breach of Implied Warranty of Fitness for a Particular Purpose should be dismissed without leave to amend. Plaintiff recently agreed to dismiss his claim for Breach of Express Warranty.

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B. THE CLAIMS FOR MISREPRESENTATION AND FRAUDULENT CONCEALMENT ARE NOT BASED ON PROPER AND SPECIFIC ASSERTIONS OF FACT [SIXTH CAUSE OF ACTION]

Claims of misrepresentation, whether intentional or negligent, and claims of fraudulent concealment, are subject to strict requirements of specificity and must be pled with particularity. *Fed. R. Civ. P*. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."); *LT Int'l Ltd. v. Shuffle Master, Inc.*, 8 F.Supp.3d 1238, 1244 (D. Nev. 2014) ("It is well-settled in the Ninth Circuit that misrepresentation claims are a species of fraud, which must meet Rule 9(b)'s particularity requirement.").

Rule 9(b) does not allow – as Plaintiff has done here – generalized and conclusory fraud allegations against all defendants jointly, especially in the absence of any relationship between the parties. "A Plaintiff must, at a minimum, identify the role of each defendant in the alleged fraudulent scheme to satisfy the fraud pleading rule."[2] *Swartz v. KPMG LLP*, 476 F.3d 756, 765 (9th. Cir. 2007); *See also Tropicana Ent. Inc. v. N3A Manufacturing, Inc.*, No. 3:16-cv-0257-LRH-VPC, 2017 WL 1330197, *4 (D. Nev. Apr. 5, 2017) (Dismissing the individual defendants as to the Fraud and Misrepresentation claims because Plaintiff made no attempt to differentiate or specify its allegations as to each individual defendant.)

This rule also requires detail as to the time, place, and manner of each act of fraud, as well as the "who, what, when, where, and how" of the proposed misconduct – all things that are missing from Plaintiff's Complaint.[3] *Vess v. Ciba-Geigy Corp. USA,* 317 F.3d 1097, 1106 (9th. Cir. 2003); *Lancaster Community Hospital v. Antelope Valley Hospital District,* 940 F.2d 397, 405 (9th. Cir. 1991). The allegations must be "specific enough to give defendants notice of the

[2] In past pain pump actions against Stryker, Courts have dismissed fraud allegations where the Complaint fails to distinguish between the various Defendants. *Quatela v. Stryker Corp*., 820 F.2d 1045, 1250 (N.D. Cal 2010) (Granting Stryker's motion to dismiss fraud claims where "Complaint does not set forth the details necessary to satisfy Rule 9(b). The misrepresentations are alleged only in the most general and conclusory fashion, with virtually no distinction between the conduct of Stryker and other defendants.")

[3] In other pain pump actions, Courts have dismissed complaints that fail to set forth the who, what, where, when and how. *Heesch v. Stryker Corp.*, 8:11-cv-01430-R-SS 2012 U.S. Dist. LEXIS 199844 (C.D. Cal 2012) ("Here, Court finds that the Complaint lacks facts specific enough to maintain this claim . . . Further lacking are details concerning the proposed misconduct by Stryker, when and how it occurred, or the persons and locations involved for these defendants and Plaintiff.")

particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner,* 780 F.2d 727, 731 (9th Cir. 1985).

Plaintiff fails to satisfy these mandatory requirements, as the Complaint simply asserts the same generalized and conclusory allegations against two different manufacturers of the prescription medical devices at issue – this is despite the fact that the alleged use of I-Flow and Stryker pain pumps occurred at different hospitals, in different cities, and months apart. Not to mention the fact that the defendants are separate medical device manufacturers that have different regulatory histories and share no commonalities concerning the manufacture and sale of the device at issue. Yet, here, Plaintiff simply asserts the same factually devoid allegations against both I-Flow and Stryker. See Complaint, ¶¶ 68-87.

In *Tropicana*, this Court dismissed defendants when the Complaint generally alleged that "defendants falsely and knowingly represented that they would abide by the terms and conditions of SWS Direct." *Tropicana*, 2017 WL 1330197, *4 (D. Nev. Apr. 5, 2017). In holding that Rule 9(b) does not allow a complaint to merely lump multiple defendants together, this Court required specificity to inform each defendant of the allegations surrounding their participation in the fraud. *Id*. As in *Tropicana*, Plaintiff's Complaint does not attribute specific misconduct to any Defendant and therefore fails to meet Rule 9(b)'s requirements. Without identifying the role Stryker played in the alleged scheme, neither the misrepresentation nor fraudulent concealment claims can survive this challenge.

Additionally, the Complaint does not set forth any factual basis to support these egregious claims for relief. Rather than providing the specific and necessary facts, the Complaint sets forth conclusory boilerplate allegations, such as, Defendants knew or should have known that the alleged misrepresentations were false. See Complaint, ¶¶ 70-83. These conclusory allegations lack the particularity required by Rule 9(b). *Puri v. Khalsa*, 674 Fed.Appx. 679, 689 (9th. Cir. 2017) (dismissing claim for negligent misrepresentation where allegations were uniformly conclusory and lacked particularized detail of any alleged misrepresentations.)

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These claims also fail because the tort of negligent misrepresentation must involve an underlying business or commercial transaction. *Barmettler v. Reno Air Inc.*, 114 Nev. 441, 449 (Nev. 1998). It is impossible for Stryker to have misrepresented any material fact to Plaintiff because the parties never engaged in a business transaction. *Phillips v. C.R. Bard, Inc.*, No. 3:12-CV-00344-RCJ, 2014 WL 7177256, at *10 (D. Nev. Dec. 16, 2014) (dismissing a negligent misrepresentation claim against a drug manufacturer); *Barmettler v. Reno Air*, Inc., 114 Nev. 441, 956 P.2d 1382, 1387 (Nev. 1998) ("The thrust of Reno Air's argument is that [negligent misrepresentation] only applies to business transactions; thus, in the context that Reno Air implemented its Drug and Alcohol Policy, this conduct does not fit squarely within a business or commercial transaction. We agree.").

With respect to the fraudulent concealment claim, the Complaint offers nothing more than general statements concerning what Defendants' [again with no differentiation between I-Flow and Stryker] should have known and then disclosed to the general public. See Complaint, ¶¶ 86-87 ("Defendants were under a duty to disclose the true facts regarding pain pump use for intra-articular joint use, and knowingly and fraudulently concealed the true facts. Plaintiff and the medical community were kept in ignorance of important information essential to pursuit of these claims…"). These legal conclusions are couched as factual allegation and should not be accepted as true. Rule 8 "contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented." *Twombly*, 550 U.S. at 556. Simply put, the Complaint lacks the necessary specifically pled facts to maintain these claims – no specificity has or can be provided as to the statements made, persons involved, the means of communication, or the manner of reliance. The shell is provided, but the required detail is missing throughout. For these reasons, and given that no facts can be alleged or invented to save this claim, Plaintiff's Sixth Cause of Action is properly dismissed without leave to amend.

C. PLAINTIFF HAS NOT AND CANNOT PROPERLY PLEAD THE RECOVERY OF PUNITIVE DAMAGES

It is well settled that courts in this district do not recognize punitive damages as a legitimate basis for an independent cause of action. *E.g. See*, *Volungis v. Liberty Muutal Fire Ins.*

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Co., No. 2:17-CV-2247 JCM (VCF) 2018 WL 3543030, at *6; *Rowe v. Clark County School Dist.*, No. 2:16-cv-661-JCM-PAL, 2017 WL 2945718, at *3 (D. Nev. July 10, 2017); *Garcia v. Nevada Property 1, LLC*, No. 2:14-cv-1707-JCM-GWF, 2015 WL 67019, at *4 (D. Nev. Jan. 6, 2015). In *Garcia*, the Court explained that punitive damages are a remedy that the Court may impose upon a finding of liability. *Garcia*, 2015 WL 67019, at *4.

Nevertheless, Plaintiff still fails to meet the necessary pleading requirements to maintain this claim. Consistent with the *Twombly* guidelines, the punitive damages are properly stricken from the Complaint because Plaintiff has not alleged any facts, let alone sufficient facts, to support the recovery of this extraordinary claim for relief. Under Nevada law, the concept of punitive damages rests on a presumed public policy: to punish a wrongdoer for his act and to deter others from acting in a similar fashion. *Nevada Cement Co. v. Lemler*, 89 Nev. 447, 452 (1973); *Ace Truck & Equip. Rentals, Inc. v. Kahn*, 103 Nev. 503, 506 (1987). Punitive damages are designed not to reward the victim, but to punish the wrongdoer and deter fraudulent, malicious, or oppressive conduct. *Turnbow v. State, Dep't of Human Resources*, 109 Nev. 493, 496 (1993). A Plaintiff is never entitled to punitive damages as a matter of right; their allowance or denial rests entirely in the discretion of the trier of fact. *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 612 (2000).

Accordingly, Nevada courts have historically disfavored punitive damages claims and, for that reason, impose rigorous pleading and proof requirements. *See* Nev. Rev. Stat. § 42.001 *et seq.* Specifically, under Nev. Rev. Stat. § 42.005, punitive damages may be awarded "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied. . . ." Section 42.001 narrowly defines the oppression, fraud and malice required to support a punitive damages claim as follows:

> 2. 'Fraud' means an intentional misrepresentation, deception or concealment of a material fact known to the person with the intent to deprive another person of his rights or property or to otherwise injure another person.
>
> 3. 'Malice, express or implied' means conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others.

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> 4. 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person.

This language plainly requires evidence that a defendant acted with a culpable state of mind that, at a minimum, exceeded mere recklessness or gross negligence. *Countrywide Home Loans. Inc. v. Thitchener*, 192 P.3d 243, 255 (Nev. 2008).

Here, and as discussed in the section above, the necessary factual elements to maintain this claim are utterly absent from the Complaint. There are no allegations — much less sufficient allegations — of fraud, oppression, and/or malice necessary to support Plaintiff's claim. Again, Plaintiff fails to explicitly lay out Stryker's fraudulent or oppressive behavior warranting punitive damages and instead refers to Defendants collectively. In sum, there are no facts pled that would put Stryker on notice of the specific nature of the acts it allegedly committed that warrant it being punished with an award of punitive damages, much less facts that reach the heightened pleading standard required under FRCP 9(b). Because Plaintiff does not and cannot identify specific examples of oppressive, malicious, or fraudulent conduct on the part of Stryker, Plaintiff's claim for punitive damages is properly stricken from the Complaint.

IV. LEAVE TO AMEND THESE CAUSES OF ACTION SHOULD BE DENIED

Here, as Plaintiff cannot invent or manufacture sufficient facts to maintain the claims and causes of action discussed herein, leave to amend should be denied. *BP West Coast Products LLC v. SKR Inc.*, 989 F. Supp. 2d 1109, 1116 (W.D. Wash 2013) (citing *United States v. SmithKline Beecham Clinical Labs.*, 245 F. 3d 1048, 1052 (9th Cir. 2001)) (leave to amend should not be granted when amendment would be futile; futility alone is enough to refuse amendment).

V. CONCLUSION

Plaintiff's Complaint unquestionably lacks several necessary elements, both factually and legally, to pursue his causes of action for breach of implied warranty, fraudulent concealment, and misrepresentation. Further, as to the remedies sought by Plaintiff, his allegations fail to allege the necessary specificity of egregious conduct on behalf of Stryker for the recovery of punitive damages. Given these facts, and the fact that Plaintiff cannot re-craft his allegations to

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meet the necessary requirements to sustain his claims, this Motion is appropriately granted without leave to amend.

DATED this 7th day of December, 2018.

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing **MOTION TO DISMISS AND STRIKE PORTIONS OF THE COMPLAINT BY DEFENDANTS STRYKER CORPORATION AND STRYKER SALES CORPORATION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** by the method indicated below and addressed as follows:

☐ **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).

☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.

☐ **BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.

☐ **BY PERSONAL DELIVERY:** by causing personal delivery by , a messenger service with which this firm maintains an account, of the document(s) listed above to the person(s) at the address(es) set forth below.

☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

☐ **BY EMAIL:** by emailing a PDF of the document listed above to the email addresses of the individual(s) listed below.

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DATED this 7th day of December, 2018.

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